

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
CURTIS MUNFORD,	:	09cv7899 (DLC)
	:	
Petitioner,	:	<u>MEMORANDUM OPINION</u>
	:	<u>AND ORDER</u>
-v-	:	
	:	
HAROLD GRAHAM, Superintendent, Auburn	:	
Correctional Facility,	:	
	:	
Respondent.	:	
	:	
-----	X	

DENISE COTE, District Judge:

On August 9, 2018, petitioner Curtis Munford filed a motion to set aside judgment pursuant to Rule 60(b)(1)-(5), Fed. R. Civ. P. This is a successive habeas petition. As a result, it will be transferred to the Court of Appeals if petitioner does not withdraw the motion within 30 days.

On February 4, 2005, Munford was convicted following a jury trial in New York Criminal Court of two counts of first degree robbery, five counts of second degree robbery, and one count of grand larceny related to the robbery of a Manhattan jewelry store. He was sentenced to an aggregate term of thirty-five years' imprisonment as a second felony offender. He appealed on the grounds that, inter alia, there was no probable cause for his arrest, he was denied due process at a suppression hearing, and the admission of his co-felon's conviction violated his

Confrontation Clause rights. The Appellate Division, First Department affirmed the conviction on March 25, 2008.

Munford filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court on September 14, 2009. That petition was denied in an Opinion and Order of June 29, 2010.

In his August 9, 2018 motion, Munford claims that he is entitled to relief because the earlier conviction that served as the predicate for his sentencing as a second felony offender was invalid. Specifically, he contends that his plea agreement in connection with that conviction is invalid because he was not informed that his sentence would include post-release supervision. This motion constitutes an attack on Munford's conviction and is properly characterized as a petition for a writ of habeas corpus. See Harris v. United States, 367 F.3d 74, 82 (2d Cir. 2004) ("a Rule 60(b) motion that *attacks the underlying conviction* presents a district court with" the option to "treat the Rule 60(b) motion as a second or successive habeas petition" (citation omitted)).

28 U.S.C. § 2244 provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).


Therefore, a second or successive habeas petition filed initially in the district court must be transferred to the Court of Appeals. Liriano v. United States, 95 F.3d 119, 123 (2d Cir. 1996) (per curiam). The Second Circuit has stated that district courts should

be careful not to recharacterize a portion of the 60(b) motion as a second or successive collateral attack and transfer it to [the Court of Appeals] until the prisoner has been informed of the district court's intent to transfer and afforded a sufficient opportunity to avoid the transfer by withdrawing . . . the portion of his 60(b) motion that the district court believes presents new challenges to the underlying conviction.

Harris, 367 F.3d at 82 (citation omitted). Accordingly, it is hereby

ORDERED that petitioner is given notice of the Court's intent to treat the motion as a successive habeas petition and given 30 days to withdraw the motion, if he elects to do so. If petitioner does not withdraw the motion within 30 days, it will be transferred to the Court of Appeals for the Second Circuit for treatment as a successive petition.

Dated: New York, New York
September 28, 2018



DENISE COTE
United States District Judge

COPY MAILED TO:

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